

[Doc. No. 240]

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY  
CAMDEN VICINAGE  
HONORABLE ROBERT B. KUGLER

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COMMODITY FUTURES TRADING	:	
COMMISSION,	:	
	:	
Plaintiff,	:	Civil No. 04-1512 (RBK)
	:	
v.	:	
	:	
EQUITY FINANCIAL GROUP, et	:	
al.,	:	
	:	
Defendants.	:	
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**ORDER**

This matter comes before the Court upon the application of Jack Vernon Abernethy for appointment of counsel pursuant to 28 U.S.C. § 1915(e). The Court has reviewed the application, and for the reasons set forth below denies Defendant Abernethy's motion.

The factual basis underlying this case has been set forth by the Court in the Report and Recommendation concerning the motion for interim distribution dated September 2, 2005 and the Opinion of the District Court dated October 4, 2005. Before the Court is Defendant Abernethy's motion for appointment of counsel<sup>1</sup> to represent him as a defendant in this action. In support of his application, Defendant Abernethy asserts that he is unable to afford counsel. Id. Defendant Abernethy has also filed an

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1. Defendant Abernethy previously filed an application for appointment of counsel that was denied because he had not been granted permission to proceed *in forma pauperis*. See Order dated September 16, 2004.

application to proceed *in forma pauperis*, which the Court has addressed by separate Report and Recommendation of even date.

In a civil action there is no "inherent right to counsel." Purnell v. Lopez, 903 F. Supp. 863, 864 (E.D. Pa. 1995). The power to grant appointment of counsel lies solely in the discretion of the court. Tabron v. Grace, 6 F.3d 147, 155 (3d Cir. 1993), cert. denied, 510 U.S. 1196 (1994). The Court is permitted to appoint counsel at any point during the litigation by granting a party's motion or by order sua sponte. Id. at 156. Generally, under § 1915(e), the Court determines first whether the claim has "some merit in fact and law." See Tabron, 6 F.3d at 155. If the Court finds that the action meets the threshold inquiry, then the following factors are taken into consideration:

- (1) Movant's ability to present his or her own case;
- (2) Difficulty or complexity of the legal issues involved in the case;
- (3) Degree to which factual investigation will be required of the movant in order to present the case and the ability of the indigent movant to pursue such discovery;
- (4) Whether and to what extent the case is likely to turn on credibility determinations;
- (5) Whether expert testimony will be required in presenting the case; and
- (6) Whether movant is able to retain and afford counsel on his or her own behalf.

Tabron, 6 F.3d at 156-57. This list is not exhaustive, nor is any one factor determinative. See id. at 157; see also Parham v. Johnson, 126 F.3d at 454, 457 (3d Cir. 1997).

As set forth in the District Court Opinion dated October 4, 2005, this action has been brought by the Commodity Future Trading Commission alleging a "multi-million dollar commodity fraud operated by Defendants Tech Traders and its president Coyt Murray. Between June 2001 and April 2004, Tech Traders allegedly solicited over \$47 million in investments by claiming to employ a portfolio trading system that guaranteed significant annual returns." See Commodity Futures Trading Commission v. Equity Financial Group, LLC, et al., No. 04-1512 (RBK), slip op. at 2 (D.N.J. Oct. 4, 2005). Defendant Abernethy allegedly acted as Tech Traders' independent certified public accountant. As the District Court noted, "Tech Traders was actually hemorrhaging money at a remarkable rate, resulting in losses in excess of \$20 million." Id.

In his motion for appointment of counsel, Defendant Abernethy asserts that he is "as much a victim of the fraud" and that he "agreed to certain procedures that I performed with the understanding of my client as to the very limited extent of responsibility I agreed to take." See Application to Proceed In Forma Pauperis [240-2]. The Court notes that while motions for appointment of counsel are often made by plaintiffs seeking redress for alleged constitutional claims, here Defendant is seeking appointment of counsel to defend the litigation, and consequently, the threshold inquiry relates to whether the defense has merit in law or fact. However, the Court need not address the threshold inquiry because, as set forth below, regardless of whether

Defendant's defense meets the threshold requirement, Defendant is not entitled to appointment of counsel under an analysis of the Tabron factors.

The first factor for consideration is the *pro se* party's ability to present his own case. See Tabron, 6 F.3d at 156. In determining such ability, the Court should consider the litigant's literacy, education, prior work experience, and prior litigation experience, in addition to the litigant's ability to understand English. See id. The Court notes that Defendant Abernethy is literate and educated. In fact, he has previously acknowledged in connection with a hearing in this case that he served as "an agent for Tech Traders, as President of Sterling Casualty & Insurance, Ltd., as a member of Strategic Investment Portfolio, and an agent of the Sterling Companies," and utilized computer equipment "in my capacity as a certified public accountant with a tax preparation business and for my personal needs." See Declaration under Penalty of Perjury of J. Vernon Abernethy Pursuant to 28 U.S.C. § 1746 at ¶ 6, attached as Exhibit F to CFTC's Reply to the Sterling Entities' Response to CFTC's Objections [169]. Moreover, Defendant is not confined or incarcerated, thereby limiting his mobility and access to legal materials, typewriters, or telephones. The Court finds that the first Tabron factor does not support granting Defendant Abernethy's application for appointment of counsel.

As to the second and third factors, Defendant Abernethy provides no assertions that the claims brought against him are too

complex to handle without an attorney. Nor has the Defendant asserted that he has struggled with complex discovery rules at this stage in the proceedings and there is no showing that he is unable to conduct discovery with respect to his defense. Moreover, to the extent Defendant is unable to obtain discovery from a party or third party, he may file an appropriate motion pursuant to the Federal Rules of Civil Procedure and the Local Civil Rules. With regard to the fourth and fifth factors, there is no reason at this time to conclude that this case will solely turn on credibility determinations, and Defendant does not allege that expert testimony is necessary for his defense. Even were expert testimony necessary for the defense, there has been no showing that Defendant is unable to address the expert issues without assistance of counsel.

With respect to the final Tabron factor, whether Defendant Abernethy is able to retain and afford counsel on his own behalf, the Court has concluded by separate Report and Recommendation that Defendant is not entitled to *in forma pauperis* status at this time, and for that reason as well, denial of appointment of counsel is warranted. Moreover, even were the Court to grant Defendant Abernethy *in forma pauperis*, on balance, the Court's analysis of the Tabron factors weigh against appointing counsel.

CONSEQUENTLY, for the reasons set forth above and for good cause shown,

IT IS on this 6th day of February 2006,

**ORDERED** that Defendant Abernethy's motion to appoint counsel shall be, and hereby is **DENIED**.

s/ Ann Marie Donio  
ANN MARIE DONIO  
UNITED STATES MAGISTRATE JUDGE

cc: Hon. Robert B. Kugler